IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 68

DELVAILLE H. THEARD,

Petitioner,

versus

UNITED STATES OF AMERICA

REPLY OF PETITIONER TO THE SUPPLEMENTAL MEMORANDUM OF THE SOLICITOR GENERAL.

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Pro Se.

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Petitioner has been served with an affidavit made by James G. Schillin, who is Chairman of the State Bar Association Grievance and Ethics Committee; this is attached to a Supplemental Memorandum of the Solicitor General.

In his Supplemental Memorandum, the Solicitor General states that the Bar Committee "has asked that this affidavit be filed with the Court". No supporting authority is cited for such filing.

It seems strange in view of the fact that this Court had not as yet acted on the Solicitor's petition for Bar Committee participation, that the Solicitor General should consider it appropriate that this affidavit, in the nature of a Brief and Argument, should be filed now without the permission of the Court. The result, perhaps unintentional, would seem to be that, no matter what this Court may rule on the application to allow the Committee to file a Brief, this argumentative affidavit, in effect, is now a Bar Committee Brief actually on file in the present proceedings.

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Although he yielded to the Committee's request to file this argumentative affidavit and it therefore comes before this Court with his approval, the Solicitor General declares that he was not originally pressured by the Committee, but that it was he who at the outset "requested the Committee to appear". The Petitioner made no charge that pressure had been used on the Department of Justice by the Bar Committee. What petitioner said (Opposition, p. 2) was, that the Solicitor's request that the Bar Committee be allowed to enter into the case "can only reflect either his own personal preference or else the pressure of a few members of the said Grievance Committee, and certainly cannot be result of any real necessity for any such intervention".

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The premature appearance of the Committee being in the form of a sworn affidavit, the affiant (Schillin) who in effect thus offers on his oath evidence of a controversial

nature, which he expects this Court to accept, stands like, and has no greater privileges than are accorded to, any other witness.

The Louisiana Supreme Court, in a case in which this affiant (Schillin) appeared both as attorney and as defendant-surety, declared that his (Schillin's) contentions on certain material facts were "refuted by the facts in the record". In *Sievers v. Samuel, 172 La. 1005, 136 So. 33*, James G. Schillin (the present affiant) was attorney, and one of the defendants as surety on a forthcoming bond which he refused to discharge. Certain personal property had been delivered on the strength of his personal signature. Said the Court, "it is certain that the Surety" (Mr. Schillin) "by executing the bond obtained the release of the property in the possession of the constable". When sued on the bond, he filed a number of technical defenses, in an attempt, as the Court said, to be released from "his obligation under the bond which he (had) voluntarily signed". The Court declared: "The surety (Mr. Schillin) finally contends that all the property covered by the bond, except the pressing machine, was either returned or tendered to the Constable. **The contention is refuted by the facts in the record**". (Emphasis ours).

It is submitted that, on the basis of the facts above referred to, this affidavit (if it is admissible and can be received on appeal) must be taken like that of any other litigant, subject to all facts of record, which affect the affiant's credibility and his reputation for veracity.

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In point of fact, this affidavit (new matter, wholly outside the Transcript of Record) has no place in this appeal, and should not be considered. In this Court, no evidence of any character can be heard or considered, that was not before the lower Court. *Holmes v. Trout*, 7 Pet. 171, 8 L. Ed. 647; *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932; *Mitchel v. United States*, 9 Pet. 711, 9 L. Ed. 283; *United States v. Miller*, 13 Wall. 577, 20 L. Ed. 705; *Boone v. Chilles*, 10 Pet. 177, 9 L. Ed. 388; *Tilt v. Kelsey*, 207 U. S. 43, 28 S. Ct. 1, 52 L. Ed. 95.

Nor does petitioner know when the so-called Transcript, referred to in the affidavit, was placed in the proceedings. From a page numbered 23 of said Transcript, there is found a quotation at page 4 of the Affidavit. Petioner received no notice of the filing of this in this Court or anywhere else; and when the praecipe for the transcript of appeal to the Circuit Court of Appeals was filed, there was, as petitioner believes, nothing corresponding to this of record below.

The Transcript herein, Tr. p. 30, shows that James G. Schillin was permitted to argue as an individual in the District Court, but not as a party. The previous order in favor of the Committee on Professional Ethics and Grievances was amended by this later order.

And of course, it is not pretended that any permission was ever granted either to Schillin or his Committee to appear as *amicus curiae* in the Circuit Court of Appeals.

The present case, it is submitted, can be tried only as made up by the Transcript of Record. The Designation of Contents as requested by petitioner pursuant to Rule 75(A) of the Rules of Federal Procedure, in the District Court was duly filed (Tr. p. 30), and was duly served on the Assistant United States Attorney (Tr. p. 31). The latter made no Designation. This, it is submitted, closed the matter. No further designation could be made and no original documents of any nature could be filed in this Court, under the authorities above listed.

However, since the Affidavit and the documents attached to it have been actually filed, petitioner is presenting, as an Appendix hereto (see p. 10), a Motion that said Affidavit and the other documents originally filed with it in this Court, be considered as improperly filed, be not considered, and be ordered returned to the party who filed them.

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The affiant Schillin says, at page 2 of the Affidavit, that he has "no personal animus whatever against petitioner".

This, although not important to petitioner, is difficult to believe, for this disbarment action filed eighteen years after the fact complained of, was instituted by the United States Attorney for the Fifth Circuit at the request of the affiant as shown by a letter from him of record in the District Court.

Further, the gratuitous announcement of the affiant that, in the face of the plain language of the State de-

cision he and his associates will deny "and continue to deny until a court of last resort of competent jurisdiction holds otherwise, that petitioner has been disbarred in the State Court solely because he had the misfortune of becoming mentally ill", demonstrates that his animus is so strong, that he declares himself absolutely unwilling to be bound by the holding of that very State Court of which he and his Committee declare themselves to be "an arm of the Supreme Court of Louisiana in all disbarment matters".

The very excerpt from the decision in Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. 310, which is quoted in the Affidavit (page 3 of the Supplemental Memorandum) shows that, using highly emotional language, affiant and his colleagues complained that the State Court had not passed on their charge and allegation of misconduct. That excerpt actually shows that the Court refused to do so, saying "in view of the conclusion reached and hereinabove declared" (viz., that conceded insanity of itself and without willful wrongdoing was sufficient) "we need not determine the Committee's exception". Thus the Court, finally and definitely excluding from consideration, the Committee's charge of misconduct, declared that insanity eighteen years previous was the sole ground of petitioner's disbarment.

Of course, the State Court decree on that point is *res judicata* against the Committee. And affiant's vehement and turbulent protest in refusing to recognize this perfectly plain decision can be fairly construed in the present case as practically only a confession of judgment that the decree of the Circuit Court of Appeals, which stands

on nothing but on this erroneous and mistaken State Court decree (and which is all that affiant can stand on), unquestionably deprives petitioner, without due process of law, of his property right to practice his profession.

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The affiant, in his argumentative affidavit, takes issue with the statement of petitioner's Opposition (page 3) that the disbarment of petitioner on account of illness, was especially reprehensible and lacking in due process, in a jurisdiction where disbarment depends on the Constitution and cannot be ordered for any ground except (as petitioner expressed it) willful misconduct. He charges petitioner with adding the adjective "willful", although it is difficult to conceive any actionable misconduct that is not willful. Indeed the charge of lack of due process herein is based precisely on a decree excluding willful or conscionable misconduct and based wholly on insanity.

But we do not have to argue this. The one, single Rule of the State Supreme Court (Article 13, Section 4, Charter of the Louisiana State Bar Association, Vol. 21, West's LSA Revised Statutes of Louisiana, page 380), which authorizes the affiant and his colleagues to bring actions for disbarment, specifically limits their right to sue to cases of "willful" misconduct. The Article reads as follows:

> "If, after investigation, a majority of the Committee shall be of the opinion that the member against whom the complaint has been made has been guilty of a violation of the laws of the State of Louisiana relating to the professional conduct of

lawyers and to the practice of law, or of a **WILLFUL** violation of any rule of professional ethics of sufficient gravity as to evidence a lack of moral fitness for the practice, it shall be the duty of the Committee to institute in the Supreme Court a suit for the disbarment or suspension of the accused member of the bar, and to designate one or more of their number to prosecute the same".

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It must be remembered that the Solicitor General, when petitioner's application for writ of certiorari to the Circuit Court of Appeal for the Fifth Circuit was originally filed herein, filed a comprehensive Opposition and Brief, in which all the features of this matter were fully argued.

The prosecution of this case, under the applicable Federal law on appeals to this Court, rests in his able and experienced hands, and will be free from the unfortunate bitterness which must result because of the regrettable conditions which the appearance of the Bar Association as prosecutor will engender.

As shown by the affidavit filed, the only point which the Bar Committee presents is a claim of misconduct, which, however, is not in the case because it was eliminated by the State Court decree; which State Court decree, as rendered and as it stands, eliminating misconduct and resting exclusively on petitioner's illness twenty years ago, constitutes the only cause of action for this proceeding for disbarment in the Federal Court.

It is hoped that this Court will decline the Bar Committee's application, and further that, in due course, the decree of the Circuit Court of Appeals for the Fifth Circuit herein will be reversed.

Respectfully submitted,

DELVAILLE H. THEARD,
Petitioner,
Pro Se.

CERTIFICATE.

Copies of the foregoing Reply have been served on J. Lee Rankin, Solicitor General of the United States, and on M. Hepburn Many, United States Attorney for the Eastern District of Louisiana, by depositing said copies in the mail, postage prepaid, at New Orleans, on September 25, 1956. A copy has been sent also to James G. Schillin, affiant.

New Orleans, Louisiana, September 25, 1956.

APPENDIX.

Order.

Now comes Delvaille H. Theard, original defendant in this cause, and in this Court petitioner for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and respectfully shows to this Honorable Court that a certain affidavit by James G. Schillin, Chairman of the Committee on Professional Ethics and Grievances of the Louisiana State Bar Association, together with original documents and a transcript of proceedings which form no proper part of the Transcript of Record in this cause, were improperly filed in this Court, also without notice to mover and on date or dates of which mover is unadvised.

And said Delvaille H. Theard, petitioner, now accordingly moves this Court to render its order that said affidavit and the other documents referred to, shall be considered as improperly filed and not forming part of the record on certiorari herein, shall be not considered, and shall be returned to the party who filed them in this cause.

TURN TO

NEXT CARD